QUESTION PRESENTED

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave?

PARTIES

The petitioners are Tracy Ragsdale and Warren E. Dupwe, trustee in bankruptcy for the Tracy Ragsdale estate. The respondent Wolverine Worldwide, Inc., in connection with the events giving rise to this action, was doing business as Frolic Footwear.

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OPINIONS BELOW

The November 3, 1998, decision of the district court, which is not reported, is set out at pp. 83-100 of the Joint Appendix. The August 5, 1999, order of the district court, which is not reported, is set out at p. 101 of the Joint Appendix. The July 11, 2000, decision of the court of appeals, which is reported at 218 F. 3d 933 (8th Cir. 2000), is set out at pp. 102-106 of the Joint Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 11, 2000. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 8, 2000. The petition for a writ of certiorari was filed on September 5, 2000. This Court granted certiorari on June 25, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in an appendix to this brief.

STATEMENT OF THE CASE

On March 17, 1995, petitioner began her employment with respondent Wolverine Worldwide, Inc. For almost a year she worked assembling shoes at a division of the company known as Frolic Footwear. Petitioner was paid

on a piecework basis, and earned approximately $6.00 an hour.

In February, 1996, Ragsdale was diagnosed with Hodgkins disease. She underwent surgery for the removal of her spleen. From March through August 1996, Ragsdale underwent radiation treatments five days a week for her cancer. As a result of the surgery and radiation, Ragsdale was, for a substantial period of time, unable to work.

At the time of the surgery Ragsdale was not yet eligible for leave under the Family Medical Leave Act because she had not worked for Wolverine Worldwide for a full year. Wolverine's leave policies, embodied in a collective bargaining agreement,[1] did not provide any paid sick leave or any paid personal leave. Workers with less than 25 years experience could only take vacation leave when the plant closed in July and December; because she had then worked for Wolverine less than a year, Ragsdale was not yet entitled to any vacation. The company, however, did permit workers to take up to seven months of unpaid sick leave, provided that they submitted every 30 days a request for an extension of that leave. On February 21, 1996, Ragsdale requested and was granted unpaid sick leave under this employer-sponsored policy. During the first six months of this period Ragsdale continued to be covered by the employer's health insurance plan.

When in September of 1996 Ragsdale returned to the plant to request another extension of her sick leave, she

[1] Deposition of Tracy Ragsdale, Ex. 1.

was advised that no further extensions would be granted, and that she would be dismissed if she did not resume work by September 20, 1996. Although the company policy also permitted unpaid personal leave, she was not offered that. Ragsdale requested that she be given leave under the Family Medical Leave Act. There is conflicting evidence about how the company responded. According to Ragsdale, her foreman, the plant manager, and one other official all denied familiarity with the FMLA, and never replied to her request for FMLA leave.[2] Another Wolverine official, however, asserted that Ragsdale "was informed that she was not eligible for FMLA, and to the extent she was, it had been incorporated within her company provided leave."[3] Wolverine did not claim, however, that any company official, prior to September 1996, had notified Ragsdale that she was, or might be, utilizing FMLA leave. Although 29 C.F.R. § 825.301(c) requires an employer to provide certain information to any employee who qualifies for FMLA leave, Wolverine never provided that information to Ragsdale either. It is undisputed that in September 1996 Wolverine refused to permit Ragsdale to take leave under the FMLA.

Faced with this demand that she return to work or face dismissal, Ragsdale consulted her physician. He advised Ragsdale that she needed to conserve her strength to recover from the radiation treatments, but that she could resume work for four hours a day. Ragsdale asked the company if she could return to work on that reduced schedule, but the employer rejected her request.

[2] Deposition of Tracy Ragsdale, p. 40.

[3] Affidavit of Robert H. Smith, p. 2 ¶ 9.

Ragsdale asserted that other workers had been permitted to work four hours a day, a contention that the company disputed.[4] In any event, Ragsdale was dismissed on September 20, 1996.

Ragsdale resumed work for another employer by mid-December 1996, prior to the point when 12 weeks of FMLA leave granted on September 20, 1996 would have ended. Her cancer has not recurred. As a result of medical bills and loss of income caused by her illness, however, Ragsdale went bankrupt.[5]

Ragsdale, together with the trustee of her estate in bankruptcy, brought this action in federal district court in 1997. The complaint asserted, inter alia, that Wolverine had violated the FMLA. Petitioners relied on regulations issued by the Secretary of Labor regarding workers on leave under an employer-provided leave plan. Sections 825.208 (App. 2), 825.301(b)(1) (App. 8) and 825.700(a) (App. 8) of those regulations provide in such a situation that a period of leave does not count as part of an employee's 12-week FMLA entitlement until and unless the employer notifies the employee that it has designated the leave as FMLA leave. Since Wolverine admittedly had not made such a designation or provided such notice, petitioners argued, Ragsdale was still entitled to 12 weeks of FMLA leave when her employer-provided leave ended in September 1996.

The employer moved for summary judgment on two grounds. First, it contended that Ragsdale had never been

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[4] Deposition of Tracy Ragsdale, pp. 53-56.

[5] Deposition of Tracy Ragsdale, p. 57.

eligible for any FMLA leave because when she first requested leave she had not yet worked for Wolverine the requisite twelve months. See 29 U.S.C. § 2611(2)(A)(i). Second, the company argued that the designation and notice requirements of the regulations on which Ragsdale had relied were invalid.

The district court held that Ragsdale had become qualified for FMLA leave in March, 1996, on the first anniversary of the date when she had been initially hired. (J.App. 87). The court concluded, however, that the regulations on which petitioners had relied were invalid. (J.App. 92). On appeal the Eighth Circuit held that the regulations were invalid as applied in the instant case; it reasoned, however, that the regulations would be valid in a case in which the employee could show that he or she had some need for the notice which the regulations require.

SUMMARY OF ARGUMENT

I. The Family and Medical Leave Act provides workers with a bundle of rights. Those various rights safeguard, elaborate on and enhance the statutory entitlement of 12 weeks of unpaid leave each year for a serious health condition or for certain other specified purposes. The informed exercise of those rights is often essential if a worker is to obtain the full benefit of, or perhaps any benefit at all from, the FMLA.

Information is often the sine qua non of leave under the FMLA. Unlike the federal minimum wage laws, the benefit of which is usually included directly in a worker's

paycheck, the FMLA is a complex set of employee prerogatives, options and entitlements. In the frequently occurring situation involving the interrelationship of FMLA leave and employer-provided leave, an employee must utilize those FMLA rights with particular care.

In the instant case, petitioner Ragsdale, unaware as she was of those rights, derived no benefit at all from the statute. Had Ragsdale known of and effectively used the employee prerogatives provided by the Act, her FMLA and employer-provided leave would have run consecutively, and she would have remained on leave until she was healthy enough to return to work.

II. Where an employee on employer-provided leave is also entitled to FMLA leave, the regulations at issue in this case do not permit an employer to count that leave against the employee's 12-week FMLA entitlement unless the employer has so notified the worker. Absent such notification, a worker is unlikely to realize that he or she is entitled to the benefits of the FMLA, and may well forfeit many or all of the worker's rights under the Act.

The court of appeals correctly recognized that there are situations under the FMLA in which an employee's lack of information so interferes with his or her exercise of FMLA rights that the employee cannot fairly be said to have been accorded FMLA leave. It concluded that the regulations would be valid in such instances. That court erred, however, in insisting that the FMLA mandates case-specific determinations of the impact of a lack of information. The text of the statute does not require such a cumbersome approach.

The Secretary of Labor legitimately chose instead to adopt a "bright line rule", treating as essential notice that an employee is entitled to FMLA leave, and refusing to count employer-provided leave as FMLA leave unless that notice has been provided. That represented a reasonable construction of the FMLA, and was consistent with this Court's practice of adopting bright line rules in construing both the Constitution and statutes.

III. The regulations in this case also operate to provide a straightforward rule for determining whether FMLA and employer-provided leave will run concurrently or consecutively. An employer can assure the leaves will run concurrently simply by providing to the employee the designation and notice specified by the regulations. Where the employer fails to do so, however, the regulations establish as the default rule that the leaves will run consecutively.

The court below objected that the default rule could penalize unwary employers. But some default rule is necessary in this situation. The text of the statute reflects no clear congressional intent as to which default rule should be used, and the Seretary's choice was a reasonable one.

ARGUMENT

I. INTRODUCTION

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, provides that

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(D) (App. 1). The Act confers the same right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health problem. 29 U.S.C. § 2612(a)(1)(A)-(C) (App. 1).

The FMLA expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. §§ 2651-53. Conversely, the law provides that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652.

The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. § 2654. Pursuant to that authority, the Secretary has promulgated detailed regulations concerning information which employers must provide to employees, and vice versa. Section 825.208(a) of the regulations provides that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee." 29 C.F.R. § 825.208(a) (App. 2). The notice to the employee must explain that leave designated as FMLA leave "will be

counted against the employee's annual FMLA leave entitlement." 29 C.F.R. § 825.301(b)(1)(i).

The form of notice is flexible. Notice can be provided orally or in writing. 29 C.F.R. § 825.208(b)(2) (App. 5). If the notice is oral, it must be confirmed in writing shortly thereafter. "The written notice may be in any form, including a notation on the employee's pay stub." *Id.* In general, an employer cannot designate leave as FMLA qualifying leave after the leave has already been taken. Retroactive designation and notice are permissible, however, where the employer reasonably was unaware until a later time that the employee was entitled to FMLA leave. 29 C.F.R. § 825.208(b)(1) (App. 4).

A related regulation provides that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

II. THE REGULATIONS AT ISSUE MUST BE UPHELD UNDER *CHEVRON* UNLESS THEY EITHER ARE CONTRARY TO THE CLEARLY EXPRESSED INTENT OF CONGRESS OR ARE OTHERWISE AN UNREASONABLE INTERPRETATION OF THE FMLA

A challenge to the validity of administrative regulations is governed by *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the

> question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted). In the absence of such clear congressional intent, an agency's interpretation will be upheld so long as it is "a reasonable one." 467 U.S. at 845.

Deference to the interpretation of the FMLA embodied in the regulations in this case is for several reasons particularly appropriate. Regulations promulgated contemporaneously with the statute they interpret are accorded special weight. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981). In this case, the interim regulations were promulgated on June 4, 1993, four months after the February 5, 1993 enactment of the FMLA. (58 Fed. Reg. 31821, 31832 (1993)). The rule making process was unusually thorough, drawing hundreds of detailed comments from members of Congress and employer and employee organizations prior to the issuance of the interim rules and again prior to the promulgation of the final regulations. (60 Fed. Reg. 2180 (1995)). The final version of section 825.208(b) contained a

number of significant changes, adopted at the behest of several employers and employer organizations, to facilitate the designation process. (60 Fed. Reg. 2207-08 (1995)). On the other hand, no objections appear to have been raised to the provision in the interim and final version of section 825.700(a) that employer-provided leave which the employer has not designated as FMLA leave cannot count against an employee's 12-week FMLA entitlement. (60 Fed. Reg. 2229-30 (1995)).

III. THE REGULATIONS REASONABLY INTERPRET THE FMLA TO PROVIDE THAT AN EMPLOYEE HAS NOT RECEIVED THE LEAVE REQUIRED BY THE STATUTE IF HE OR SHE HAS NOT BEEN PROVIDED BY THE EMPLOYER WITH INFORMATION ESSENTIAL FOR A FULL AND EFFECTIVE UTILIZATION OF THE SUBSTANTIVE RIGHTS ESTABLISHED BY THE STATUTE

A. The Leave To Which An Employee Is Entitled Under The FMLA Encompasses A Bundle of Rights

The decision of the court of appeals rests on a single, repeatedly stated and fatally flawed premise – that the sole right guaranteed by the FMLA is that 12 weeks during which a worker was qualified for FMLA leave must coincide with weeks during which he or she was in fact on leave. "The terms of the statute contemplate *only* that the employer will be required to provide a 'total' of twelve weeks of unpaid leave." (J.App. 110) (Emphasis added) (See 29 U.S.C. § 2612(a)(1) (App. 1), 29 U.S.C. § 2612(d)(1)).

In reality both the terms and the operations of the FMLA are far more complex. In addition to requiring that an employee be permitted to take twelve weeks of leave, the FMLA imposes affirmative obligations on employers during that period of leave, provides to employees important prerogatives which they can exercise during that leave, gives employees rights which enable them to conserve or augment the available leave period, and establishes requirements which an employer must meet when the employee returns to work. In some instances employees who under the FMLA are not eligible for reinstatement are nonetheless entitled to the rights, prerogatives and benefits of FMLA leave.[6]

The statute imposes on the employer during the term of the FMLA leave several significant affirmative obligations. The employer must maintain coverage under any "group health plan" (as defined in 26 U.S.C. § 5000(b)(1)). 29 U.S.C. § 2614(c)(1) (App. 2). The level and conditions of that medical coverage must be the same as would have existed if the employee were still working. *Id.* Thus, the amount of any premiums the worker pays cannot be increased because of the FMLA leave, and the worker must be afforded an opportunity to select any new types of coverage offered to current workers. 29 C.F.R. § 825.209. Because employers are required to keep records specified by the applicable regulations, 29 U.S.C. § 2616(b), and because regulations require certain records regarding workers on FMLA leave, 29 C.F.R. § 825.500(c),

[6] See 29 C.F.R. § 825.312(f).

the fact that a worker is on FMLA leave triggers additional record keeping obligations.[7]

In addition, the statute confers on employees several important prerogatives which they may exercise during the period of FMLA leave. First, an employee on FMLA leave is entitled to "substitute" accrued paid vacation leave, personnel leave, and (depending on the type of FMLA leave) family or sick leave for unpaid leave. 29 U.S.C. § 2612(b)(2). An employer's personnel rules might otherwise provide that a worker, although having such accrued paid leave, would under certain circumstances instead be limited to utilizing employer-provided unpaid leave.[8] By exercising his or her FMLA right to substitute

[7] In this case it is undisputed that Ragsdale in fact received six months of medical coverage during the employer-sponsored leave.

In support of its motion for summary judgment, the company asserted only that it had made premium payments for this coverage "as provided by its policy." Affidavit of Robert H. Smith, p. 2 ¶ 9. It is unclear whether this refers to the health insurance policy or the company's policy regarding workers on unpaid sick leave. This assertion clearly falls short of an allegation that Ragsdale herself paid only the same premiums she would have owed had she remained a full time employee.

Respondent has never contended with regard to Ragsdale's leave that it kept the records required in connection with an FMLA leave.

[8] Respondent's leave plan appears to operate in this manner. Most workers can only use their vacation leave during a fixed period in July and December of each year, which may not overlap with the employee's absence. Even if the absence does overlap with those periods, it is at best unclear if the employee could insert paid vacation leave in the middle of an unpaid sick leave.

paid leave, a worker can increase his or her income during the leave period, and may be able to extend the total leave period, since the worker would not be using unpaid employer leave during the days of the substituted paid leave.[9]

Second, under the FMLA an employee with the requisite serious health condition is entitled to take leave intermittently, such as by working fewer than the normal number of hours a day. 29 U.S.C. § 2612(b)(1) (App. 1). An employer-provided sick leave plan might not accord the worker this option. The exercise of this prerogative can benefit the worker in either or both of two distinct ways. An employee who elects to work on a reduced schedule will receive a portion of his or her usual paycheck, rather than remaining entirely on unpaid leave. In addition, an employee who works intermittently will be using up his or her FMLA leave at a slower pace, allowing the employee to remain on leave longer or to save part of that FMLA leave for some anticipated or unexpected future need.

Third, once an employee is on FMLA leave, the worker would be free to disregard any leave-eligibility standards established by an employer that were more demanding than those for FMLA leave.[10] 29 C.F.R.

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[9] This would occur if the employer-sponsored unpaid leave was for more than 12 weeks. By substituting paid leave during the period when the employee qualified for FMLA leave, the employee would during that time use less of his or her allotment of unpaid employer-sponsored leave.

[10] Respondent's leave has two such requirements. First, the employee must provide every 30 days a new certification from his or her health care provider. (J.App. 45). Under the FMLA an employer can only require a new certification if it has reason to believe that an earlier certification is no longer accurate. 29 C.F.R. § 825.305(c). Second, under respondent's plan, sick leave apparently is provided only if the employee is unable to work at all. (J.App. 45). Under the FMLA, on the other hand, a worker with a serious health condition need only show that he or she for that reason is unable to perform his own job. 29 U.S.C. § 2612(a)(1)(D).

§ 825.207(h). Thus if, for example, the employer's leave plan required certification by a company doctor, the worker could decline to submit to that additional physical examination except in the narrow circumstances in which the FMLA allows the employer to insist on a second medical opinion. 29 U.S.C. § 2613(c). This would avoid the inconvenience and invasion of privacy involved in having to be examined by a health care provider other than the employee's own.

Fourth, in some circumstances this difference in eligibility requirements under the FMLA and under the employer-provided leave plan would afford the worker another, even more important option. When a worker is on FMLA leave, the employer has a right to substitute paid leave, but not to substitute unpaid leave. 29 U.S.C. § 2612(d)(2) (App. 1). If an employee is initially awarded unpaid employer-provided leave with a heightened eligibility requirement, but the employer then notifies the worker that it has also designated the leave as FMLA leave, the employee will know that he or she can then opt to stop meeting that heightened requirement. Since the worker would no longer qualify for the employer-provided leave, the employee would *only* be utilizing FMLA

leave. At the end of the FMLA period, the worker could resume meeting the standard for, and thus once again receive, the employer-provided leave. In this manner, where the employer-provided leave both is unpaid and contains an eligibility standard higher than that for FMLA leave, the employee has the ability under the FMLA to use the FMLA and employer-provided leave consecutively rather than concurrently.

Finally, the structure of the FMLA provides employees with a variety of ways to conserve and even augment the amount of leave available for a given need. The statute allots to an employee not a single leave of up to 12 weeks, but "a total" of 12 weeks of leave a year. 29 U.S.C. § 2612(a)(1). Thus an employee can control the amount of leave he or she will have available later in a year by reducing the amount of leave utilized in earlier periods. That option is especially important for leave under subsections (A), (B), and (C) of section 2612, all of which involve care for other people. An employee, by arranging for some other form of care earlier in a year, can assure the continued availability of unused leave later in the year.

Second, the employee is entitled to a new 12 weeks of leave for each 12 month period. 29 U.S.C. § 2612(a)(1). If the employer opts to designate calendar years as the 12 month period it is using, or if the employer fails to make any designation at all, the employee could take 12 weeks of leave at the end of one year followed by 12 weeks of leave at the beginning of the next. See 29 C.F.R. § 825.200. Thus the employee can control the total amount of continuous FMLA leave he or she has by timing the commencement of that leave towards the end of a calendar year.

This is likely to be a particularly valuable option for an employee who has the ability to determine when he or she will utilize FMLA leave, such as by choosing when to begin care for an ailing parent or when to have non-emergency surgery.

Two other FMLA rules are also relevant to how an employee utilizes FMLA leave. Employers can generally designate either paid or unpaid employer-provided leave as also being FMLA leave, causing the FMLA leave to run concurrently; thus if a worker requests two weeks of vacation to take care of a new baby, the employer can designate that leave as also being FMLA leave. But an employer cannot do this if the worker has taken compensatory leave under the Fair Labor Standard Act. 29 C.F.R. § 825.207(i). Thus it may be important which form of non-FMLA leave a worker chooses to use. In addition, periods of more than a week when the employer's business activity has generally ceased, such as a combined Christmas/New Year break, cannot count towards the 12 week FMLA total. 29 C.F.R. § 825.200(f). Thus a worker who schedules his or her leave to include such a period will be able to remain on leave for an additional calendar week or more.

Finally, when the employee returns from leave, the worker must be restored to the position he or she held prior to the leave, or to an equivalent position. 29 U.S.C. § 2614(a). The employee must also be afforded any across-the-board raises that were given to other employees during that period of leave. 29 C.F.R. § 825.215(c).

B. Information Is Essential To The Utilization of FMLA Rights

Information is the sine qua non of FMLA leave. The FMLA in this regard is very different from the minimum wage provisions of the Fair Labor Standards Act. For most workers the benefit of the minimum wage laws is included in the paycheck they receive. So long as the employer has obeyed the law, a worker can enjoy the full benefits of his or her FLSA rights simply by cashing that paycheck and spending or saving the proceeds in whatever way he or she pleases. The employee can (and often may) obtain the full benefits of the minimum wage law without ever understanding the details of that law and its implementing regulations, or even knowing of their existence.

But the FMLA is not a simple cash payment; it is a complex interrelated set of employee rights, prerogatives, and options. The benefit (if any) which an employee derives from the FMLA can depend largely on an understanding of the rights he or she has under that system, an understanding which usually must begin with a realization that the worker is entitled to FMLA leave. It is exceedingly unlikely that a worker unaware that he or she qualifies for FMLA leave will ever invoke any of the prerogatives provided by the law, or use any of the methods available to conserve or maximize FMLA leave. An employee who does not realize when and how FMLA leave can be used will be incapable of planning work, leave, care and/or medical treatment in a manner that obtains maximum (or in some cases any) benefit from the FMLA.

Because an employer's own vacation and other leave rules constantly have a considerable impact on the schedule and lives of its employees, those workers can be expected to familiarize themselves with and rely on those practices. But until an employee has been alerted to the fact that he or she is entitled to FMLA leave, the worker will have little reason to try to understand the often quite different and frequently more favorable parallel set of rules that exist under the FMLA.

The situation in which this problem most often arises creates a particularly great need for express notice about the FMLA. Frequently, as occurred in this case, that need arises where an employee simply asks for leave, and is told by the employer that he or she can take some form of employer-provided leave. Many employees do not even know of the existence of the FMLA. Those who do would be unlikely to realize from a request and response referring only to employer-provided leave that they are also entitled to the benefits, prerogatives and rights of FMLA leave. Workers who need to go on leave generally rely on their employers for a candid explanation of their rights and options; whatever an employer's motives may be, if an employer's explanation omits any reference to the fact that the worker is entitled to FMLA leave, the worker will fairly but mistakenly assume that the explanation which he or she has received is a complete statement of his or her rights.

In the instant case Ms. Ragsdale, although qualified for FMLA leave, derived no benefit whatsoever from the statute. An informed exercise of the rights provided by the FMLA would clearly have been to her advantage. If Wolverine had notified Ragsdale that it was designating

her leave as FMLA leave, Ragsdale would have been prompted to inquire about the significance of that designation. Once Ragsdale qualified for FMLA leave, Wolverine was obligated to provide Ragsdale with additional written information about her rights under the statute, 29 C.F.R. § 825.301(c); the company never did so.[11] Wolverine would also have been required to provide whatever additional information Ragsdale might have requested. 29 C.F.R. § 825.301(d).

Armed with the resulting information, Ragsdale would have been able to invoke her FMLA rights in a variety of ways. She could have chosen to temporarily stop qualifying for the company's unpaid sick leave,[12] instead using up her FMLA leave, and then have resumed use of the company-provided leave when the FMLA leave had ended. By proceeding in that manner, Ragsdale would have utilized the two leaves consecutively rather than concurrently, and have had enough combined leave to last until she was able to return to work in late 1996. By invoking her right under section 2612(b)(1) to use FMLA medical leave intermittently, Ragsdale could have extended beyond 12 calendar weeks the total time she was on FMLA leave. If this extended the period of FMLA leave until the company's annual two week July closing, that would in effect have added yet another two calendar weeks to her FMLA leave. 29 C.F.R. § 825.200(f). And,

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[11] Designation might itself have alerted Wolverine officials to their obligation to provide that information.

[12] Ragsdale could have done so by not filing requests for 30 day sick leave renewals, or by not providing the monthly medical certification required by the company.

once she passed the first anniversary of the date on which she was originally hired, Ragsdale could have asserted her right under section 2612(d)(2)(B) (App. 1) to substitute her week of vacation pay for a week of the FMLA leave.

Because Wolverine never gave Ragsdale the designation and notice contemplated by the regulations, however, none of this ever came to pass.

C. The Designation Required By The Regulations Is Essential For The Full and Effective Utilization of FMLA Rights

The regulations at issue in this case reflect a determination by the Secretary that where an employee entitled to FMLA leave is placed on company-provided leave without being told of that entitlement, that omission is so likely to impair the effective exercise of FMLA leave rights that the employer cannot be said to have accorded to the employee the leave to which he or she is entitled under section 2612.

The withholding of information essential to the exercise of much of the bundle of FMLA rights is the practical equivalent of a denial of those rights themselves. This Court has long recognized that principle with regard to rights established by the Fifth and Sixth Amendments. A suspect during a custodial interrogation cannot ordinarily exercise or knowingly waive his or her rights to counsel and against self-incrimination without being told of those constitutional protections. *Miranda v. Arizona*, 384 U.S. 436 (1966). A state could not meet its obligations under *Gideon v. Wainwright*, 372 U.S. 335 (1963), to provide trial

counsel to indigent criminal defendants if it hired lawyers for that purpose, and had one at the ready in every courtroom, but neglected to mention the availability of counsel to pro se indigent defendants. Defendants who have not been expressly told of their rights to a trial, to a jury, to confrontation of witnesses and to compulsory process cannot waive those rights simply by pleading guilty. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Although Congress provided that an employee entitled to FMLA leave should be afforded an array of rights, the statute does not specify the point at which so many of those rights have been withheld or interfered with that what remains is insufficient to constitute FMLA leave at all. A denial of some FMLA rights, although less than a denial of all, could undoubtedly be so serious that what remained would no longer count towards meeting an employer's obligation to provide 12 weeks of leave "under section 2612." Some defects are sufficiently harmful that they alter the nature of the subject. A stallion whose mane has been cut off is merely a less attractive stallion, but a gelding is not a stallion at all.

If an employee asked for 12 weeks of leave, but the employer granted only half that number, the denial of the other 6 weeks of leave would violate the FMLA, but the 6 weeks that were granted would (at least absent unusual circumstances) count as FMLA leave and reduce the worker's allotment accordingly. But if an employee asked for 12 weeks of leave, and was told that he or she had to work for 4 hours a day throughout the period, what the worker received would not count as FMLA leave at all, even though the total hours of leave accorded would be the same as in the first example.

The regulations reflect a determination by the Secretary that denial of notice to an employee receiving employer-provided leave that he or she qualifies for FMLA leave so seriously impairs the bundle of FMLA rights that that leave cannot "count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). The Secretary has acted with restraint in drawing the distinction between what constitutes merely defective FMLA leave, sufficient to exhaust the employer's twelve week obligation even though constituting a violation of the law, and a partial set of benefits so deficient that they do not constitute FMLA leave at all. Under the regulations, twelve weeks of otherwise sufficient leave which omit medical benefits is FMLA leave nonetheless; the employee cannot obtain more leave during the 12 month period, although he or she can sue for the monetary loss caused by that omission. Only where an employer has failed by designation to notify an employee of his or her FMLA entitlement do the regulations conclude that under the statute the leave simply cannot count as FMLA leave at all. This is precisely the sort of judgment that Congress authorized the Secretary to make by regulation.

The distinction drawn by the regulations is a sensible one. Where an employer has denied a specific identifiable right, or even several, it will often be practicable after the fact for a court or jury to assess what monetary loss resulted. But where an employer fails even to advise an employee that he or she has qualified for FMLA leave, determining the consequences of that omission will often be impossibly complex. A trier of fact would be forced to reconstruct an elaborate series of consequences, attempting to recreate how the employee and employer would

have acted and interacted over what might be a period of months, an exercise in conjecture whose outcome and accuracy would be unknowable. The regulations were adopted for the express purpose of avoiding "protracted 'after the fact' disputes." (60 Fed. Reg. 2207 (1995)). The Secretary permissibly concluded that an employer who failed to provide that critical information should not be deemed to have provided FMLA leave at all.

D. The Secretary Reasonably Adopted A Bright Line Rule Regarding What Information An Employer Must Provide If Employer-Provided Leave Is To Count As FMLA Leave

The Eighth Circuit did not hold that the FMLA notice and designation regulations are always invalid. To the contrary, it insisted that the regulations would be valid in any case in which the specific worker involved actually needed the information to exercise his or her rights under the FMLA. (J.App. 114). The court of appeals summarily applied that holding to the instant case, asserting without explanation that Ragsdale could not have put that information to any use. (J.App. 115).

This disposition was entirely inappropriate in the procedural posture of this case. Wolverine's motion for summary judgment was based solely on its contention that the FMLA regulations are invalid in all applications, a contention accepted by the district court although not by the court of appeals. Under the applicable local rules Wolverine was required to submit a statement of the facts

which it asserted were undisputed.[13] Wolverine's statement of undisputed facts did not include an assertion that Ragsdale had no need for the omitted designation and notice.[14] Petitioners were never afforded any opportunity to demonstrate that Ragsdale would indeed have benefitted from the missing information, or even provided an opportunity to respond to an appropriately framed contention to the contrary.

More fundamentally, the court of appeals erred in assuming that the FMLA could only be construed in a manner requiring individualized case-by-case determinations as to whether each employee needed a particular item of information. On that view, a regulation would be valid in its entirety only if it stated that notice of designation was to be given "to any employee who needs it" or if it enumerated all the situations in which that notice would be useful to employees. A regulation phrased in general terms would provide employers no meaningful guidance as to when designation and notice are and are not required. A regulation listing all the situations in which notice of designation would be valuable to employees, although long and complex, would be no more helpful to employers, which would rarely know enough about the personal circumstances of each worker to be able to discern which worker would benefit from what information. Under a statute such as the FMLA one of the central purposes of a regulation is to provide clear notice to the affected parties of their respective rights and

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[13] Local Rule 56.1, E.D.Ark.

[14] Defendant's Statement of Additional Undisputed Facts.

obligations. The sort of regulation suggested by the court of appeals would fall far short of that goal.

The Eighth Circuit conspicuously failed to appreciate the wide range of circumstances in which employees could put to good use an understanding that they were entitled to the full protections of FMLA leave. Its analysis is devoid of any reference to the prerogatives accorded to employees during a period of FMLA leave, and reflects little understanding of the complex ways in which employees can conserve, or augment the number of, available FMLA leave days. The Secretary, rather than attempting to fashion a complex, fact-dependent notification requirement, properly adopted a single bright line rule.

This Court has repeatedly and quite self-consciously created bright line rules in interpreting the constitution,[15] statutes,[16] treaties,[17] and rules.[18] It has also approved the decision of administrative agencies to create such clear rules.[19] The bright line created by the regulations in this case provides employers with a clear statement of the

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[15] *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Michigan v. Jackson*, 475 U.S. 625 (1986); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

[16] *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *Basic, Inc. v. Levinson*, 485 U.S. 224, 233 (1988).

[17] *Chan v. Korean Air Lines*, 490 U.S. 122 (1988).

[18] *Houston v. Lack*, 487 U.S. 266, 275 (1988).

[19] *Auriello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 788 (1996).

simple steps they must take if they want to assure that the leave they are providing is sufficient to count as FMLA leave. The Secretary was under no obligation to adopt the vaguely phrased standard proposed by the court of appeals which, although more favorable to some employers who fail to provide designation and notice, would leave most employers uncertain as to the scope of their obligations, and many employees unaware of their rights.

IV. THE REGULATIONS PROVIDE A REASONABLE INTERPRETATION OF WHEN UNDER THE STATUTE FMLA LEAVE AND EMPLOYER-PROVIDED LEAVE DO AND DO NOT RUN CONCURRENTLY

The coexistence of FMLA leave and various types of employer-sponsored leave poses a question that has long arisen in personnel administration. Many employers afford their workers several different types of leave, paid and/or unpaid. Each form of leave has its own criterion of eligibility, some broad (e.g., vacation or personal leave) and some quite narrow (funeral leave). See 5 C.F.R. pt. 630. It inevitably occurs that circumstances arise in which an employee is eligible for several different types of leave. A worker hospitalized for appendicitis, for example, would typically qualify to use both sick leave and vacation leave.

Any system with multiple, potentially overlapping types of leave requires a rule for resolving two issues: (1) whether the employee or the employer selects which type of leave is used, and (2) whether a day of absence qualifying for two types of leave must be deducted from both or

only from one. Under most employer plans such an absence will utilize only one type of leave; the periods for vacation leave and sick leave, for example, ordinarily can be used consecutively. A similar problem arises if a longer period of leave encompasses a holiday, such as Thanksgiving, that is accorded to all or most workers; that holiday may or may not be included in the determination of how many days of leave were used. In these circumstances the employer's own policy (possibly constrained by a collective bargaining agreement) will determine whether the overlapping types of leave will run concurrently.

A more complex situation arises where, as here, the two (or more) types of overlapping leave arise from different sources, one an employer-provided leave plan, the other the requirements of federal (or state) law. In such a case a determination must be made as to whether the choice between concurrent and consecutive use of the two overlapping types of leave will be dictated by federal law or be resolved according to the wishes of the employer or of the employee. The very creation by the FMLA of federally mandated leave requires the existence of a rule regarding how the choice between consecutive and concurrent utilization will be made.

That question is in some but not all situations addressed and resolved by the express terms of the FMLA. First, if the employee requests leave, and the employer offers only unpaid FMLA leave, the employee in turn can insist that the employer "substitute" certain types of paid leave. 29 U.S.C. § 2612(d)(2). Substitution means that the employee will be consuming concurrently his or her entitlement to FMLA leave and the employer-

provided paid leave, but the employee will benefit from the income under the paid employer-sponsored leave.

Second, if the employee asks only for FMLA leave, preferring to avoid using up his or her employer-provided paid leave, the employer in turn can insist that the employee substitute certain types of paid leave. That insistence will cost the employer money, but will mean that the leaves run concurrently. Because the employer must act through the employee, "requir[ing] the employee to substitute" the employer-provided leave, the employee is necessarily alerted to the fact that both types of leave are being consumed. Section 2612(d)(2) limits the types of paid leave which one party or the other can, by demanding substitution, cause to be used concurrently with the FMLA leave.[20] If, however, the employer offers or the employee requests only FMLA leave, and no request for substitution is made, the FMLA leave and employer-provided paid leave (assuming the worker is absent long enough to later need to invoke the employer-provided leave) will run consecutively.

The statute, however, is silent with regard to two other situations – (1) an employee entitled to FMLA leave simply requests leave, without mentioning the FMLA,

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[20] For FMLA leave under subsections (A) and (B), substitution can be required of paid vacation, personal, or family leave. For FMLA leave under subsection (C), substitution can be required of paid vacation, personal, family or sick leave. For FMLA leave under subsection (D), substitution can be required of paid vacation, personal, or sick leave.

Substitution cannot be required of other types of paid leave, such as paid disability leave.

and the employer in providing leave explains only that it is some form of employer-provided leave, and (2) (less commonly, but the case here) an employee initially ineligible for FMLA leave, and thus awarded some form of employer-provided leave, later becomes eligible for, but does not (at least for a period of time) request by name, FMLA leave. The substitution provision of section 2612(d) does not apply, since the employee in both situations is already receiving employer-provided leave. No provision of the statute itself establishes a rule for determining in these cases whether FMLA leave will be deemed to run concurrently with the employer-provided leave. The administration of the FMLA, however, clearly requires the existence of some such rule, because without it there would be no way to know at the end of the employer-provided leave period whether an employee was still entitled to FMLA leave (because the leaves run consecutively) or was not (because the leaves had run concurrently).

This question obviously is not one to which "Congress has spoken directly." *Chevron*, 467 U.S. at 842. To the contrary, the complete absence of any statutory provision for determining whether (and if so when) FMLA and employer-provided leave shall run concurrently or consecutively in these two situations is undeniably "a gap for the agency to fill." 467 U.S. at 843.

The regulations fill this gap by establishing a standard and procedure that are analogous to the approach taken by section 2612(d). As under section 2612(d), the employer is accorded the option of insisting that FMLA and employer-provided leave run concurrently. In the absence of employer designation under the regulations,

as in the absence of employer (or employee) substitution under section 2612(d), the two types of leave will run consecutively. Consecutive utilization of the two forms of leave is the default rule if designation and notice do not occur. The notice requirement included in the regulations, like the section 2612(d) requirement that the employer act through the employee, assures that the employee will understand that the two types of leave are running concurrently.

Neither the employer nor the court of appeals objected to the fact that the regulations permit concurrent utilization of FMLA and employer-sponsored leave, or to the fact that the employer is allowed to decide whether that will occur. They challenge only the default rule. But the existence of *some* default rule is a necessary part of a legal regime in which the employer has (but may fail to exercise) the right to decide whether or not the employer-sponsored leave counts as and thus runs concurrently with FMLA leave. Of course, the Secretary could have chosen the opposite default rule – deeming employer-provided leave also to be FMLA leave unless the employer designated otherwise. But the text of the statute itself obviously does not require that one default rule or the other be selected.

The Secretary's decision to adopt the default rule in question was assuredly reasonable. That default rule provides the employer with an incentive to resolve the matter quickly, thus enabling the worker to exercise his or her FMLA rights in an effective and informed manner. Thus, employer *in*action is not permitted to interfere with or deny the exercise of FMLA rights. See 29 U.S.C. § 2615(a)(1) (App. 2). If a federal employee asks for and

recieves annual leave, sick leave, or some other type of agency-provided leave, it is the policy of the federal government *not* also to deduct that period of leave from the worker's 12 week FMLA entitlement, unless the worker expressly asks that the two types of leave run concurrently.[21] The default rule at issue in this case, in the absence of any notice to the contrary to the affected employee, deems the employer's policy to be the same as that of the national government.

The court of appeals objected that the default rule could operate to the disadvantage of an "unwary" employer if the employer, which would have preferred that the FMLA and employer-provided leave run concurrently, neglected to exercise its right to designate the leave as FMLA leave. (J.App. 112). The opposite default rule, however, although preferred by the employer in this case, would in turn impose a more serious burden on many employees. If mere inaction on the part of an employer had the effect of making FMLA leave run concurrently with the employer-provided leave, an employee who was told only that he or she was receiving employer-provided leave would ordinarily have no reason to conclude or suspect that he or she was also utilizing his or her FMLA leave. The Secretary reasonably concluded that the employer, not the employees, should run the risks of unwariness. Employers are in a far better position than

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[21] 5 C.F.R. § 630.1203(h) ("An agency may not put an employee on family and medical leave and may not subtract leave from an employee's entitlement to leave . . . unless the agency has obtained confirmation from the employee of his or her intent to invoke entitlement to leave [under the FMLA].")

workers to familiarize themselves with the provisions of, and their obligations under, the statute and regulations. The FMLA applies only to employers with at least 50 employees. Companies of that size will already have personnel officials, or accounting or other outside firms, that deal with the myriad of federal and state laws regarding the employment relationship; most will have either in-house counsel or attorneys on retainer. Countless government and private publications alert personnel officials to their responsibilities under the FMLA. The FMLA regulations include a model leave-application form which expressly alerts company officials to the need to make a designation decision. 29 C.F.R. pt. 825, App. D. If in those circumstances an employer fails to make the designation it would have wanted, that is not because the firm has been unfairly blindsided, but because its human resources department, outside consultants or lawyers simply did not do their jobs. An ordinary worker, on the other hand, has neither the staff, the resources nor the expertise necessary to learn of the existence of a default rule favorable to the employer, or thus to understand that an employer's mere silence means that the worker is utilizing his or her FMLA leave concurrently with his employer-provided leave.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

L. ONEAL SUTTER
Counsel of Record
HARRILL & SUTTER, P.L.L.C.
310 Natural Resources Drive
Post Office Box 26321
Little Rock, Arkansas 72221-6321
(501) 224-1050

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
School of Law
1100 N.E. Campus Parkway
Seattle, Washington 9810[illegible]
(206) 616-3167

Counsel for Petitioners

APPENDIX OF STATUTES AND REGULATIONS

29 U.S.C. § 2612(a)(1)

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(b)(1)

[L]eave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary.

29 U.S.C. § 2612(d)(2)(B)

An eligible employee may elect, or an employer may require, the employee to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of

the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2614(c)(1)

[D]uring any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions the coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

29 U.S.C. § 2615(a)(1)

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2654

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such

notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice,

though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between

the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate

leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absences preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.301(b)(1)

The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. . . . Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208) . . .

29 C.F.R. § 825.700(a)

. . . If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.